Ketua Pengarah Kementerian Kesihatan Malaysia & Anor v Dr Ghandi Rajan a/l Arjunun

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–138–04 OF 2013
ABDUL WAHAB PATAIL, HAMID SULTAN AND UMI KALTHUM JJCA
2 JULY 2015

Civil Procedure — Appeal — Appeal against decision of High Court — Renewal of licence for private hospital — Refusal by Jabatan Kesihatan Negeri Selangor to renew licence — Allegation that certain features did not comply with Private Hospitals Regulations 1973 ('Regulation 1973') and medical practice — Coming into force of Private Healthcare Facilities and Services Act 1998 — Premises sealed notice of offence issued — Whether closure of same clinic lawful

This was an appeal against the decision of the High Court in allowing the respondent's application for a declaratory order that the closure of Klinik Salina and Rumah Bersalin owned by the respondent was against the law; and that the closure of the same be declared unlawful and Klinik Salina and Rumah Bersalin be allowed to continue to operate. In 2004, the respondent, a doctor, submitted an application for renewal of licence for a private hospital in the said premises. Jabatan Kesihatan Negeri Selangor ('JKNS') rejected the respondent's application stating that the JKNS refused to process the application because there were certain features in the said premises and its administration which did not comply with the Private Hospitals Regulations 1973 ('Regulation 1973') and medical practice. The respondent was to notify JKNS for further inspection on the said premises after the respondent had done the necessary rectifications. Since there was no response from the respondent, JKNS notified the respondent that it was an offence to operate a private hospital without licence and advised the respondent to provide outpatient services only. The respondent submitted a new application for renewal and claimed that the all the requirements had been met. JKNS alleged that the application was incomplete. The respondent resubmitted the application for renewal. In 2006, JKNS issued a warning to the respondent stating that the said premises was without a licence, which was an offence under Private Hospital Act 1971 ('Act 43') and the forthcoming Private Healthcare Facilities and Services Act 1998 ('Act 586'). When Act 586 came into operation, the respondent resubmitted the application but was once again refused. The Ministry of Health issued a reminder that the maternity home should not be in operation because it had no licence under Act 586. Pursuant to s 91 of Act 586, the inspectors then sealed the said premises and issued to the respondent a

notice of offence and seal of premises ('seal notice'). The respondent filed another application to get the approval within 21 days as notified by the appellants however it was rejected by the appellants. The respondent filed an originating motion at the High Court seeking for declaratory reliefs to challenge the appellant's conduct in issuing the seal notice and consequently sealing off the said premises. The High Court allowed the respondent's application. Hence, the present appeal.

Held, allowing the appeal with costs:

(1) The licence for the said premises under Act 43 expired on 31 July 2004. The respondent did try to renew the licence, however it was rejected by the appellants for various reasons. When Act 586 came into effect, Act 43 was repealed. Therefore, since the said premise's licence to operate expired in 2004 and the respondent had failed to get it renewed in accordance with Act 43, the status of the said premises remain as unlicensed private hospital under Act 43 as well as under the new Act 586 (see para 16).

(2) With the coming into force of Act 586, the said premises needed to be licensed under the said Act. The respondent had no licence to operate the said premises. The question now was whether the appellant was empowered to issue the seal notice and consequently sealed off the said premises. The appellants submitted that the inspection made on the said premises was prompted by a report of a death of a mother during delivery incident which had allegedly occurred in the said premises. However, whether or not such incident did occur at the said premises was not material to the finding that the respondent did not have a licence to operate the said premises as a maternity home. It would not invalidate any findings made as a result of such inspection. The appellants had 'reasonable cause' to believe that the said premises was operating without a licence seeing that during the inspection, the respondent had failed to tender evidence that the said premises had been licensed (see paras 18–19).

(3) The appellant had successfully proved that the seal notice was valid under the law. The closure and sealing of the said premise were not bad in law. The appellant's actions were very much to protect the health of members of the public and to ensure that maternity homes were safe to the public utilising its services as mandated by Act 43 and subsequently by Act 586 and Regulations made under it. The failure to appreciate this fact by the High Court judge when she allowed the respondent's application and ignoring the fact that the respondent had not complied with the appellants'/JKNS' requirements before a licence could be issued to him resulted in effect in flouting of the law (see paras 24–25).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam membenarkan permohonan responden untuk deklarasi perintah bahawa penutupan Klinik Salina dan Rumah Bersalin yang dimiliki oleh responden adalah terhadap undang-undang; dan bahawa penutupan yang sama diisytiharkan bersalahan dengan undang-undang dan Klinik Salina dan Rumah Bersalin dibenarkan untuk terus beroperasi. Pada tahun 2004, responden, seorang doktor menghantar satu permohonan untuk memperbaharui lessen untuk hospital swasta di premis tersebut. Jabatan Kesihatan Negeri Selangor ('JKNS') menolak permohonan responden menyatakan bahawa JKNS enggan untuk memproses permohonan kerana terdapat beberapa ciri dalam premis tersebut dan pentadbiran yang tidak mematuhi Peraturan-Peraturan Hospital Swasta 1973 ('Peraturan-Peraturan') dan amalan perubatan. Responden perlu memaklumkan JKNS untuk manjalankan pemeriksaan lanjut premis tersebut selepas responden telah membuat pembaikan yang perlu. Memandangkan tiada jawapan daripada responden, JKNS memaklumkan kepada responden bahawa ia adalah satu kesalahan untuk mengoperasikan hospital swasta tanpa lesen dan menasihatkan responden untuk menyediakan perkhidmatan pesakit luar sahaja. Responden menghantar permohonan baru untuk pembaharuan dan mendakwa bahawa kesemua kehendak telah dipenuhi. JKNS mendakwa bahawa permohonan adalah tidak lengkap. Responden menghantar permohonan untuk pembaharuan. Pada tahun 2006, JKNS mengeluarkan amaran kepada responden menyatakan bahawa premis adalah tidak mempunyai lessen yang mana merupakan kesalahan di bawah Akta Hospital Swasta 1973 ('Akta 43') dan Akta Private Healthcare Facilities and Services Act 1998 ('Akta 586'). Apabila Akta 586 mula beroperasi, responden menghantar kembali permohonan tetapi sekali lagi ditolak. Menteri Kesihatan mengeluarkan peringatan bahawa rumah bersalin tidak boleh beroperasi kerana ia tidak mempunyai lesen di bawah Akta 586. Menurut s 91 Akta 586, pemeriksa kemudian menyita premis tersebut dan mengeluarkan notis kesalahan kepada responden dan menyita premis ('seal notice'). Responden kemudian memfailkan lagi permohonan untuk mendapatkan kelulusan dalam tempoh 21 hari seperti yang dimaklumkan oleh perayu walau bagaimanapun ditolak oleh perayu. Responden memfailkan saman pemula di Mahkamah Tinggi memohon deklarasi relief untuk mencabar tindakan perayu kerana mengeluarkan *seal notice* dan akibatnya menyita premis tersebut. Mahkamah Tinggi membenarkan permohonan responden. Maka, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Lesen permit tersebut di bawah Akta 43 telah tamat tempoh pada 31 Julai 2004. Responden cuba untuk memperbaharui lesen, tetapi ditolak oleh perayu atas pelbagai sebab. Apabila Akta 586 berkuatkuasa, Akta 43 dimansuhkan. Oleh itu, memandangkan lesen premis tersebut untuk beroperasi tamat tempoh pada 2004 dan responden gagal untuk

memperbaharuinya menurut Akta 43, status premis tersebut kekal sebagai hospital swasta tidak berlesen di bawah Akta 43 dan juga Akta 458 yang baru (lihat perenggan 16).

(2) Dengan berkuatkuasanya Akta 586, premis tersebut perlu dilesenkan di bawah Akta tersebut. Responden tidak mempunyai lesen untuk beroperasi di premis tersebut. Persoalannya sekarang ialah sama ada perayu telah diberi kuasa untuk mengeluarkan *seal notice* itu dan seterusnya menutup premis tersebut. Perayu berhujah bahawa pemeriksaan yang dibuat di premis tersebut didorong oleh laporan satu kematian seorang ibu sewaktu bersalin yang didakwa berlaku di premis tersebut. Walau bagaimanapun, sama ada atau tidak kejadian seumpama itu berlaku di premis tersebut tidak material kepada dapatan bahawa responden tidak mempunyai lesen untuk beroperasi di premis tersebut sebagai rumah bersalin. Ia tidak akan membatalkan apa-apa keputusan yang dibuat hasil daripada pemeriksaan itu. Perayu mempunyai 'reasonable cause' untuk mempercayai bahawa premis tersebut beroperasi tanpa lesen melihat kepada semasa pemeriksaan itu, responden telah gagal mengemukakan bukti bahawa premis tersebut telah dilesenkan (lihat perenggan 18–19).

(3) Perayu telah berjaya membuktikan bahawa *seal notice* itu adalah sah di bawah undang-undang. Penutupan dan penyitaan premis tersebut adalah baik di sisi undang-undang. Tindakan perayu adalah untuk melindungi kesihatan orang awam dan untuk memastikan bahawa rumah bersalin adalah selamat untuk orang ramai menggunakan perkhidmatannya seperti yang dimandatkan oleh Akta 43 dan kemudiannya oleh Akta 586 dan Peraturan-peraturan yang dibuat di bawahnya. Kegagalan untuk menilai fakta ini oleh hakim Mahkamah Tinggi ketika dia membenarkan permohonan responden dan mengabaikan hakikat bahawa responden telah tidak dipatuhi keperluan perayu-perayu/'JKNS' sebelum lesen boleh dikeluarkan kepadanya menyebabkan kesan dalam melanggar daripada undang-undang (lihat perenggan 24–25).]]]]]]

Notes

For cases on appeal against decision of High Court, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 913–915.

Cases referred to

Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna [2013] 7 CLJ 681, CA (refd)

Legislation referred to

Medical Act 1971
Private Healthcare Facilities and Services Act 1998 s 3, 15(1), 91, 91(1), 120(1)
Private Healthcare Facilities And Services (Private Hospital and other Private Healthcare Facilities) Regulations 2006 Form 1
Private Hospital Act 1971 (repealed by the Private Healthcare Facilities and Services Act 1998)
Private Hospitals Regulations 1973

Appeal from: Originating Motion No R1-24–170 of 2011 (High Court, Kuala Lumpur)

Norhisham bin Ismail (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
T Gunaseelan (Gunaseelan & Assoc) for the respondent.

Umi Kalthum JCA:

[1] The appeal is against the decision by the learned judge of the High Court dated 28 February 2013 in allowing the respondent's application for declaratory order that the closure of Klinik Salina and Rumah Bersalin owned by the respondent was against the law, that is, the Medical Act 1971 and Private Healthcare Facilities and Services Act 1998, that the closure of the same be declared unlawful and Klinik Salina and Rumah Bersalin be allowed to continue to operate.

FACTS

[2] The background facts could be summarised as follows. The respondent is a medical doctor. In 1990 the respondent met one Dr Samsudin who owned a private maternity home and clinic called 'Klinik Salina dan Rumah Bersalin' at No 28, Jalan Tengku Diauddin, 41000 Klang ('the said premises'). Dr Samsudin intended to sell his practice at the clinic which has been in operation for about 20 years. The respondent then bought the practice from Dr Samsudin. The respondent carried on with the said practice. The respondent had two mid-wives, two nurses, a full time doctor and ten workers.

[3] In 2004, the respondent submitted an application for renewal of licence for a private hospital in the said premises. An inspection was conducted by officers from Jabatan Kesihatan Negeri Selangor ('JKNS') at the said premises. However, vide a letter dated 17 August 2004, JKNS rejected the respondent's application stating that the JKNS refused to process the application because there were certain features in the said premises and its administration which did not comply with the Private Hospitals Regulations 1973 ('Regulation 1973')

and medical practice. JKNS cited a few examples of non-compliance such as there was no scrub room and changing room outside the operation theatre, no proper movement of soiled equipment and instruments from the operation theatre to the 'dirty room' and no sterilisation area for the operation theatre. The respondent was to notify JKNS for further inspection on the said premises after the respondent had done the necessary rectifications. Since there was no response from the respondent, on the 19 May 2005, JKNS notified the respondent that it was an offence to operate a private hospital without licence and advised the respondent to provide outpatient services only.

[4] On 14 October 2005, the respondent submitted a new application for renewal and claimed that the respondent had satisfied all the requirements that were imposed by the appellants. JKNS vide letter dated 20 October 2005 indicated that JKNS refused to process the application because the application was incomplete. The respondent failed to submit a copy of the annual practising certificate of the midwife, fire certificate, national registration number of nurses, agreement for ambulance service, agreement for supply of blood, agreement for clinical waste management services. JKNS returned the application form to the respondent and requested the respondent to resubmit a completed application.

[5] On 22 November 2005, the respondent resubmitted the application for renewal together with a letter of confirmation that the services for ambulance, blood supply, clinical waste management, pest control and laundry services were being provided to the said premises. The application was returned to the respondent on 20 December 2005, because the respondent failed to provide the agreements on the engagement of the various services required by the JKNS including the licence or certificate of fitness for the autoclave machine from the Department of Occupational Safety and Health.

[6] On 7 March 2006, JKNS issued a warning to the respondent stating that the said premises was without a licence, which is an offence under Private Hospital Act 1971 ('Act 43') and the forthcoming Private Healthcare Facilities and Services Act 1998 ('Act 586'). JKNS reminded the respondent to submit application for licence and advised the respondent to provide outpatient service only. On the 1 May 2006, Act 586 came into operation.

[7] On 8 February 2007, the respondent resubmitted the application to JKNS for renewal of licence to provide private healthcare facility and service. Once again JKNS refused to process the application on the ground that the application was incomplete for lack of certificate of fitness for autoclave machine. Moreover, since the maternity home had no licence to operate since 31 July 2004, JKNS advised the respondent to apply for licence as a new maternity home by applying for approval to establish or maintain a new private

healthcare facility and service in Form 1 of the Private Healthcare Facilities And Services (Private Hospital and other Private Healthcare Facilities) Regulations 2006 ('Regulations 2006'). On 23 March 2007, the Ministry of Health issued a reminder that the maternity home should not be in operation because it has no licence under Act 586.

[8] On 5 June 2008, acting upon instructions of the Mesyuarat Jawatankuasa Kematian Ibu Peringkat Negeri Selangor, a team of enforcement officers/inspectors from the first appellant's office conducted an inspection on the said premises. During the inspection, it was found that the said premises was operating as a private maternity home without a licence as required under Act 586 and Regulations 2006. Pursuant to s 91 of Act 586, the inspectors then sealed the said premises and issued to the respondent a notice of offence and seal of premises ('seal notice'). In the same seal notice, a period of 21 days was given to the respondent to produce the necessary licence if the respondent wants to remove the seal notice.

[9] The respondent filed another application to get the approval within 21 days as notified by the appellants however it was rejected by the appellants.

[10] The respondent filed the originating motion praying for the following reliefs:

(a) Satu Perintah dan Deklarasi bahawa Penutupan/Mengelak premis ('Closure of Clinic') Klinik Salina dan Rumah Bersalin beralamat di No. 28 Jalan Tengku Diauddin, 41000 Klang pada 5.6.2008 tidak mengikuti kaedah-kaedah Medical Act 1971 dan 'Private Healthcare Facilities and Services Act 1998 (Akta 586) And Regulations and Order' dan undang-undang sedia ada;

(b) Satu Perintah Deklarasi bahawa Penutupan/Mengelak Premis ('Closure of Clinic') Klinik Salina dan Rumah Bersalin beralamat di No. 28 Jalan Tengku Diauddin, 41000 Klang pada 5.6.2008 tidak mengikuti kaedah-kaedah Medical Act 1971 dan 'Private Healthcare Facilities and Services Act 1998 (Akta 586) And Regulations and Order' dan undang-undang sedia ada, dibatalkan dan/atau diketepikan atas sebab pihak Pemohon membantah dengan keseluruhan tindakan Responden ...;

(c) Selaras dengan perintah dan deklarasi (b) di atas, satu Perintah dan Deklarasi bahawa Responden diperintahkan supaya membenarkan pembukaan semula dan mengamal praktis 'Klinik Salina dan Rumah Bersalin' di bawah dan mengikut Part XIX seksyen 120 'Private Healthcare Facilities and Services Act 1998 (Akta 586) And Regulations and Order ...'

HIGH COURT

[11] On 28 February 2013, the learned High Court judge allowed the respondent's application. Her Ladyship in her brief grounds of judgment stated:

> [3] Saya telah meneliti kertas kausa dan hujahan kedua-dua pihak. Saya mendapati terdapat keterangan yang menunjukkan bahawa pemohon sememangnya telah membuat permohonan untuk mendapatkan lesen berkenaan semenjak daripada tahun 2004 lagi dan bahawa pihak responden telah sentiasa mengubah kehendak-kehendak yang perlu dipatuhi dari tahun ke tahun. Keterangan bahawa terdapatnya kematian di klinik berkenaan pada tarikh yang disebut itu juga adalah meragukan dan pemohon telah menunjukkan yang ianya berlaku di hospital lain.
>
> [4] Saya bersetuju dengan hujah-hujah pihak pemohon dan berdasarkan fakta dan keterangan yang dibentangkan berpendapat bahawa pihak responden telah gagal untuk mengambil kira fakta yang relevan dan telah mengambil kira fakta yang tidak relevan dalam membuat keputusannya. Permohonan dibenarkan dengan kos.

[12] In the opinion of the learned High Court judge, the appellants had failed to take into account the fact that the respondent had applied for licence since 2004 but for the conduct of the appellants who had repeatedly varied the conditions for approval from time to time. This had resulted in the non-processing and non-issuance of licence for the said premises. The respondent had also successfully refuted the incidence of death involving a women allegedly said to have happened at the said premises.

[13] In so deciding, the learned judge had allowed the said premises to continue to be in operation without a licence.

THE APPEAL

[14] At the outset, there was a preliminary issue raised by the appellants, that is, whether the respondent had correctly used the appropriate mode in initiating the action at the High Court. At the High Court, the respondent filed an originating motion seeking for declaratory reliefs to challenge the appellant's conduct in issuing the 'Notis Kesalahan dan Mengelak Premis' dated 5 June 2008 and consequently sealing off the said premises. Before us, learned senior federal counsel for the appellants submitted that for this purpose the respondent should have filed an application for judicial review instead of an originating motion. Since this issue was not taken up before the learned High Court judge we declined to deal with this issue on the validity of the mode taken by the respondent.

[15] Moving on to the appeal before us, learned senior federal counsel for the appellants raised the issue of whether the learned High Court judge had

exercised her discretion judiciously based on the facts and circumstances of the case in allowing the application for declaratory orders by the respondent and the order for the removal of the seal to the said premises and allowing the respondent to continue to operate his healthcare facilities and services on the said premises.

[16] Having heard the parties, on the facts, we found that the licence for the said premises under Act 43 expired on 31 July 2004. The respondent did try to renew the licence, however it was rejected by the appellants for various reasons. When Act 586 came into effect on 1 May 2006, Act 43 was repealed. Section 120(1) of Act 586 states:

> *Saving and transitional provisions relating to existing licensed private hospitals, maternity homes and nursing homes.*
>
> 120(1) All private hospitals, maternity homes and nursing homes licensed or deemed to have been licensed under the Private Hospitals Act 1971 shall, on the date of coming into operation of this Act, be deemed to have been licensed under this Act.

Therefore, since the said premise's licence to operate expired in 2004 and the respondent had failed to get it renewed in accordance with Act 43, the status of the said premises remain as unlicensed private hospital under Act 43 as well as under the new Act 586.

[17] Learned senior federal counsel for the appellants submitted that the respondent had repeatedly failed to furnish the appellants a complete application form for renewal of licence and the respondent had also failed to comply with the prescribed conditions under the law. The conditions required to be fulfilled by the respondent for the purpose of renewal of licence are all provided for in the Regulations. Therefore without a valid licence, the said premises should not be allowed to continue to operate. The repeated reminders and advice by the first appellant (in the form of the JKNS) since the year 2005 for the said premises to stop operation and to provide only outpatient treatment were consistently ignored by the respondent.

[18] With the coming into force of Act 586, the said premises needs to be licensed under the said Act. On licence, s 3 of Act 586 states:

> *Approval and licence*
>
> 3 No person shall establish or maintain any of the following private healthcare facilities or services without approval being granted under paragraph 12(a) or operate or provide any of such facilities or services without a licence granted under paragraph 19(a):
>
> (a) a private hospital;

(b) a private psychiatric hospital;

(c) a private ambulatory care centre;

(d) a private nursing home;

(e) a private psychiatric nursing home;

(f) a private maternity home;

(g) a private blood bank;

(h) a private haemodialysis centre;

(i) a private hospice;

(j) a private community mental health centre;

(k) any other private healthcare facility or service or health-related service as the Minister may specify, from time to time, by notification in the *Gazette*; and

(l) a private healthcare premises incorporating any two or more of the facilities or services in paragraphs (a) to (k).

[19] Therefore in the instant case, the fact was clear that the respondent had no licence to operate the said premises. The question now was whether the appellant was empowered to issue the 'Notis Kesalahan dan Mengelak Premis' dated 5 June 2008 and consequently sealed off the said premises. Learned senior federal counsel for the appellants submitted that the inspection made on the said premises was prompted by a report of a death of a mother during delivery incident which had allegedly occurred in the said premises. However, whether or not such incident did occur at the said premises was not material to the finding that the respondent did not have a licence to operate the said premises as a maternity home. It would not invalidate any findings made as a result of such inspection. The appellants had 'reasonable cause' to believe that the said premises was operating without a licence seeing that during the inspection, the respondent had failed to tender evidence that the said premises had been licensed. The statutory power to seal the said premises is provided under s 91(1) of Act 586 as follows:

Power to seal.

91(1) Where an Inspector has reasonable cause to believe that any premises or place is being used as a private healthcare facility or to provide any private healthcare services –

(a) without being licensed or registered under this Act; or

(b) in contravention of any of the conditions imposed by the Director General,

the Inspector may immediately take such steps as he deems necessary or by any means seal such premises or place. ...

[20] In any case, the respondent, in his affidavit-in-reply to the appellants' affidavit-in-reply at paras 7(iii), (iv), (v) and (vi) stated as follows:

> 7. Saya merujuk kepada perenggan 9 dan 10 Afidavit Balasan tersebut. Sebagai menjawab kepada perenggan 10.1, saya menjawab seperti berikut:
>
> ...
>
> iii) Sebenarnya tiada kematian ibu bersalin berlaku pada 03/10/2008 di premis Klinik Salina dan Rumah Bersalin;
>
> iv) Satu kematian berlaku di Hospital Tengku Ampuan Rahimah Klang, Selangor pada 03/01/2008.
>
> v) Pada 15/12/2007 terdapat satu ibu bersalin yang hendak bersalin yang datang ke Klinik Salina tersebut dan mendaftar untuk bersalin. Ibu bersalin didapati mengidap Post Partum Haemorhage. Kami dapat 'resuscitat' ibu bersalin tersebut dan rujuk ke Hospital Tengku Ampuan Rahimah, Klang. Selanjutnya ibu bersalin tersebut dipindahkan kepada Hospital Tengku Ampuan Rahimah Klang.
>
> vi) Kami percaya bahawa ibu bersalin ini 'lived for 18 days before pronounce dead on 03/01/2008' di Hospital Tengku Ampuan Rahimah Klang.

What was admitted by the respondent was that, though there was no death of a mother during delivery at his maternity home, the death occurred at the Tengku Ampuan Rahimah Hospital in Klang on 3 January 2008. He then related this death to the incident on 15 December 2007, where a woman wanted to deliver her baby at the Klinik Salina/the said premises and was registered at the said Klinik. The said mother was found to have suffered from 'Post Partum Haemorrhage' and that the woman was 'resuscitated' at the Klinik and who was then referred and transferred to the Tengku Ampuan Rahimah Hospital in Klang where she died 18 days later. In the circumstances, we were of the view that the inspection conducted by the inspectors was certainly grounded on this valid basis.

[21] Further in the case of *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna* [2013] 7 CLJ 681 at paras 31–35 , the Court of Appeal, per Zaharah Ibrahim JCA, held as follows:

> [31] It was not in dispute that there was no licence issued for the installation at the premises of the DVD replicating machines and equipment at the new premises at the time of the search, and therefore there could not be any manufacturer's code specified in any licence in respect of those premises for the machines and equipment installed there.
>
> [32] The codes in the appellant's possession were for Krauses Massei KM 80-190 CD 94 machines installed and approved for such installation at its old premises.

The machines/equipment at the new premises were 'Staeg Hamatech' and 'Anwell DVD Smartline'. Yet, the appellant used those same codes for the machines at the new premises.

[33] That being the case, the seizure of the machines and equipment was clearly done in the reasonable belief that they contain information as to the commission of some offence, for which the search was conducted in the first place. Such seizure was therefore within the ambit of the powers conferred on the respondents by s 38(2) of the ODA (Optical Discs Act).

[22] On the other hand, learned counsel for the respondent in reply submitted that as at 2007, the respondent had fulfilled all the conditions and submitted his application. However the appellants rejected and imposed further conditions. Those new requirements imposed by the appellants in the following years could have surely been informed in previous years instead of receiving an application form for a particular year and imposing new requirements for that year and repeatedly imposing new requirements as and when the respondent forwarded an application for renewal of license. The respondent also submitted that the respondent has a legitimate expectation that the licence would be granted.

[23] It would seem to us that the respondent's arguments were that the JKNS should have considered his various applications for renewal of licence since 2004 as a cumulative application and compliance of the terms and conditions imposed by JKNS throughout the years. Seen from the respondent's view point, the JKNS had unreasonably withheld its approval since it would seem that the JKNS kept on changing its terms and conditions. What the respondent failed to address was the fact that he had applied for the renewal of the license since 2004, and each time it was rejected by reason that he had failed to comply with some requirements of the law and the JKNS. Upon being rejected, the respondent did not take quick remedial action and to resubmit his application for the relevant year, but instead he reapplied for renewal in the following year thus rendering his application as a fresh application for approval of the JKNS. In so doing, the respondent could not have a legitimate expectation for obtaining the licence upon compliance with the conditions imposed. If the respondent submitted fresh application for each year for renewal of licence, it was not surprising that the JKNS treated it as a fresh application each time it was submitted and considered it on its merits. We did not see anything inappropriate about this process seeing that a licence is subject to renewal, this might also include such matters as agreements entered into, for instance, for blood supply, for clinical waste management, for fire certificate etc are also subject to renewal. Certainly there can be no estoppel where the application is a new application, and the requirements imposed are not shown to be contrary to or to exceed the responsibility of the respondent. Section 15(1) of Act 586 provides as follows:

Application for licence to operate or provide

15(1) An application for a licence to operate or provide a private healthcare facility or service other than a private medical clinic or a private dental clinic shall be made to the Director General–

(a) in the prescribed form and manner;

(b) accompanied by the prescribed fee; and

(c) by submitting together with the application such information, particulars and documents as may be specified by the Director General.

(2) At any time after receiving the application and before it is determined, the Director General may by written notice require the applicant to provide additional information, particulars or documents.

(3) The requirement under paragraph (1)(c) and subsection (2) may differ as between different descriptions of private healthcare facilities or services.

(4) *Where additional information, particulars or documents required under paragraph (1)(c) and subsection (2) is or are not provided by the applicant within the specified time or extended time, the application–*

(a) *shall be deemed to have been withdrawn; and*

(b) *shall not be further proceeded with,*

without prejudice to a fresh application being made by the applicant.

(5) An application may be withdrawn at any time before it is granted or refused. (Emphasis added.)

[24] In the final analysis, it must be remembered that the appellant's actions were very much to protect the health of members of the public and to ensure that maternity homes are safe to the public utilising its services as mandated by Act 43 and subsequently by Act 586 and Regulations made thereunder. The failure to appreciate this fact by the learned High Court judge when she allowed the respondent's application and ignoring the fact that the respondent had not complied with the appellants'/JKNS' requirements before a licence could be issued to him resulted in effect in flouting of the law.

[25] As such, we found that the appellant had successfully proved that the 'Notis Kesalahan dan Mengelak Premis' dated 5 June 2008 was a valid notice under the law. We therefore found the closure and sealing of the said premise was not bad in law.

CONCLUSION

[26] For the reasons stated above, we unanimously allowed the appeal with costs of RM5,000.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor